

Enforcement of procurement law from a South African perspective¹

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1. Introduction

As is the case in many other countries, public procurement law in South Africa has emerged from the combined application of legal rules from many distinct fields of law to the phenomenon of state contracting. Since no single comprehensive statute or code has been enacted to cover this field, public procurement law in South Africa remains a hodge podge of rules from all the major branches of law. However, increased focus on this area, including increased regulation, significant increases in litigation as well as increased academic attention, has started to mould together the mixture of diverse legal rules into what is now emerging as a distinct law of public procurement. The rules aimed at the enforcement of public procurement law in South Africa reveal the same pattern. A number of specific public procurement remedies have emerged, some remedies are clearly currently experiencing a shift from general application to procurement-specific application, while another set of remedies still seems to be caught in general application form, causing tension when applied in public procurement cases. This contribution deals with the remedies to enforce public procurement regulation in South Africa. Its aim is two-fold. First, it provides an overview of the current public procurement remedies regime in South Africa. Given the limited scope of the paper, this overview is necessarily a concise one. Secondly, the paper aims to highlight a number of problem areas in the remedies regime. While remedies are the primary focus of this contribution, a number of issues relating to enforcement of procurement rules more generally such as the applicability of particular rules, timeframes and access to remedial mechanisms must be viewed alongside a narrow focus on remedies to grasp the full picture.

The eventual purpose of the paper is to draw together all the strands of the various remedies that make up the enforcement regime of public procurement law in South Africa and to draw conclusions from that overarching view on the coherence of the picture that emerges. I will argue in conclusion that this picture is one that largely lacks coherence and that there is thus a need to reassess the remedies regime in public procurement law and to develop a more coordinated and dedicated approach based on guiding constitutional principles of public procurement law.

It would of course be impossible to grasp the remedies regime for the enforcement of public procurement regulation in South Africa without any knowledge of local public procurement law. The paper thus provides a very brief introduction to South African public procurement law as background to the discussion on remedies. Following this background introduction, the remedies regime is discussed under two broad headings, viz administrative enforcement and judicial enforcement.

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2. Background: public procurement law in South Africa

The legal regulation of public procurement in South Africa is quite extensive. However, the body of rules that can be said to constitute South African public procurement law is far from coherent or structured in any systematic way. At the apex is s.217 of the Constitution,² which provides that:

“when an organ of state ... contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”³

These five constitutional principles provide a normative framework for the development of a coherent system of public procurement regulation. While progress has been made in recent years towards the implementation of such a system through a number of key pieces of legislation, the regulatory regime remains highly fragmented and all but coherently organised. This state of affairs is largely due to a plethora of statutory enactments that do not always clearly align and that focus on procurement in varying degrees. Some provisions stand at the core of public procurement law, such as the Public Finance Management Act (“PFMA”)⁴ and particularly the Treasury Regulations⁵ created under it, which contain detailed Supply Chain Management Regulations and Public-Private Partnership Regulations, the Local Government: Municipal Finance Management Act (“MFMA”),⁶ with its Municipal Supply Chain Management Regulations,⁷ and the Preferential Procurement Policy Framework Act (“PPPPFA”).⁸ These enactments provide in detail for procurement processes to be followed by contracting authorities, including rules relating to advertising, award criteria, standard contract documents, adjudication and award procedures, etc. Also notionally at the core of public procurement law is the State Tender Board Act,⁹ an enactment that predates the Constitution by some 30 years and the continued presence on the statute book of which seems curiously at odds with the new approach under the more recent legislation.¹⁰ This Act provides for centralised procurement by a state tender board (apparently now defunct) and lays down the rules pertaining to such procurement approach. These enactments are also supplemented to a significant extent by national treasury guidelines and instructions mandated in terms of the statutes.

In addition to statutes that relate directly to public procurement there are numerous further legislative provisions that touch upon public procurement in more indirect ways. These range from statutes governing litigation against public institutions,¹¹ information legislation,¹² local government structures,¹³ anti-corruption

² Constitution of the Republic of South Africa 1996 (“the Constitution”).

³ Constitution s.217(1). Subsections 2 and 3 mandate the use of public procurement for policy purposes such as advancing groups disadvantaged by unfair discrimination.

⁴ Act 1 of 1999.

⁵ Notice R225 in GG 27388 of March 15, 2005.

⁶ Act 56 of 2003.

⁷ Notice R868 in GG 27636 of May 30, 2005.

⁸ Act 5 of 2000.

⁹ Act 86 of 1968.

¹⁰ The remaining validity of the State Tender Board Act seems to be a transitional arrangement to allow for centralised procurement until such time as all procurement can be done by the particular contracting authority as envisaged in the more recent legislative regime. See P. Bolton, *The Law of Government Procurement in South Africa* (Durban: Lexis Nexis Butterworths, 2007), p.34.

¹¹ E.g. the State Liability Act 20 of 1957 and Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

¹² E.g. the Promotion of Access to Information Act 2 of 2000.

¹³ E.g. the Local Government: Municipal Systems Act 32 of 2000 (“the Systems Act”) and Local Government: Municipal Structures Act 117 of 1998.

measures,¹⁴ black economic empowerment (“BEE”)¹⁵ and state-owned enterprises.¹⁶ The picture that emerges from all these applicable enactments is one of a Byzantine regulatory regime that places legal obligations on contracting authorities in significant detail.

Public procurement is also extensively regulated by common law rules in South Africa to further complicate the regulatory picture outlined above. Apart from the obviously applicable common law fields of contract and delict (tort),¹⁷ it is also now generally accepted that public procurement decisions are subject to general principles of administrative law in South Africa.¹⁸ Contracting authorities are thus under a legal obligation to act in a lawful, reasonable and procedurally fair¹⁹ manner when taking public procurement decisions and to provide reasons to those affected by their decisions.²⁰

Against this background it is not surprising that the remedies regime relating to public procurement in South Africa is also fragmented. In the rest of this paper the various remedies available to suppliers, administrators and interested parties more generally relating to public procurement are set out.

3. Administrative enforcement: internal remedies

A first major distinction in the remedies regime is between what can be called administrative enforcement mechanisms and judicial enforcement. South Africa has no central administrative body tasked with enforcement of public procurement rules. Enforcement is done through a combination of legal mechanisms scattered throughout the administration and remedies enforced in the normal courts.

Since public procurement decisions are regarded as administrative action and thus subject to general administrative law, the strict rule that internal remedies must be exhausted before a court is approached for relief²¹ has a significant impact on supplier remedies. In terms of this rule a court’s review jurisdiction is deferred until all internal remedies have been exhausted unless “exceptional circumstances” justify a review application while internal remedies are still available. In the context of public procurement a number of such internal remedies are provided for in legislation. These include:

- reg.16A9.3 of the Treasury Regulations under the PFMA that obliges national and provincial treasuries to “establish a mechanism ... to receive and consider complaints regarding alleged non-compliance with the prescribed minimum norms and standards” in the supply chain management system;
- reg.49 (read with reg.50) of the Municipal Supply Chain Management Regulations under the MFMA that dictates that a local government’s:
 - “supply chain management policy ... must allow persons aggrieved by decisions or actions taken ... in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action”; and
- s.62 of the Systems Act.

¹⁴ E.g. the Prevention and Combating of Corrupt Activities Act 12 of 2004.

¹⁵ The Broad-Based Black Economic Empowerment Act 53 of 2003. BEE refers to the comprehensive policy in South Africa aimed at redressing the inequalities caused by racially discriminatory practices under apartheid. On the public procurement dimension of this policy generally, see P. Bolton and G. Quinot, “Social Policies in Procurement and the Government Procurement Agreement: a Perspective from South Africa” in S. Arrowsmith and R. Anderson (eds), *The WTO Regime on Government Procurement: Recent Developments and Challenges Ahead* (Cambridge: Cambridge University Press, 2011) p.459.

¹⁶ E.g. the Legal Succession to The South African Transport Services Act 9 of 1989, Eskom Conversion Act 13 of 2001 and the South African Airways Act 5 of 2007.

¹⁷ See G. Quinot, *State Commercial Activity: A Legal Framework* (Claremont: Juta Law, 2009), pp.134–211.

¹⁸ Quinot, *State Commercial Activity* (Claremont: Juta Law, 2009), p.162.

¹⁹ Constitution s.33(1).

²⁰ Constitution s.33(2).

²¹ Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) s.7(2).

Section 62(1) of the Systems Act reads:

“A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.”

This general and ostensibly wide internal appeal remedy²² has been extensively used in the public procurement context at local government level.²³ However, this provision raises a number of questions.

It is not clear exactly how the s.62 remedy and the obligation in reg.49 of the Municipal Supply Chain Management Regulations align. It seems that the latter provision does not necessarily oblige a local authority to provide for an internal appeal in its procurement policy. A narrower remedy such as review may also comply with the obligation as formulated in reg.49.²⁴ However, since a particular authority's policy cannot override the legislative provision contained in s.62 of the Systems Act, any remedy less than an internal appeal in an authority's policy will simply be subsumed by the wider s.62 appeal mechanism. Conversely, it seems that the reg.49 remedy allows for a larger group of persons to lodge complaints and against a wider range of procurement decisions than the s.62 internal appeal. The latter is restricted to a “person whose rights are affected” by the procurement decision taken in terms of a delegated power,²⁵ while the former is available to all “persons aggrieved” by any decision or action taken “in the implementation of [the authority's] supply chain management system”. The two remedies are thus not identical. While the nature of the challenge under the one (s.62) is wider in scope, it is available to a more restricted category of complainants and against a narrower category of action.

While it seems that the courts have previously accepted that disappointed bidders fall within the category of persons covered by s.62, although without identifying the exact rights that are affected,²⁶ the position has now being cast in doubt by contrasting recent judgments.²⁷ In *Loghdey v City of Cape Town*²⁸ the judge held in the High Court that “only the person who has asked or applied for the decision in question may appeal against it in terms of s 62 of the Systems Act”. On this basis the court held that the unsuccessful tenderer in the present matter did not have an appeal under s.62. This interpretation of s.62 in the procurement context is problematic. It is firstly not clear why an unsuccessful bidder would not be considered to be a “person who has asked or applied for the decision in question” if the decision referred to is the one to award the tender. The unsuccessful bidder certainly also applied for that decision. Secondly, it seems difficult to reconcile this approach with the established position of subjecting award decisions to administrative law review under PAJA, where it is a threshold requirement for the application of the Act that the decision must “adversely affect the rights of any person”.²⁹ In the more recent judgment of the Supreme Court of Appeal in *CC Groenewald v M5 Developments*,³⁰ the court thus noted that it had “no difficulty in concluding that both [the unsuccessful bidders] were entitled to appeal under s 62”. The broad

²² See *M5 Developments (Cape) (Pty) Ltd v Groenewald NO* [2009] JDR 0094 (C).

²³ See *Loghdey v City of Cape Town* (Case 100/09) January 20, 2010 at [29] fn.20.

²⁴ Cf. *Loghdey v City of Cape Town* (Case 100/09) January 20, 2010.

²⁵ See *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (Case 508/2009 (O)) February 27, 2009.

²⁶ See *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C); *Loghdey v Advanced Parking Solutions CC* 2009 (5) SA 595 (C); *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T).

²⁷ *Loghdey v City of Cape Town* (Case 100/09) January 20, 2010 and *CC Groenewald v M5 Developments* [2010] ZASCA 47 (March 31, 2010). See G. Quinot, “Public Procurement” (2010) 1 *Juta's Quarterly Review of South African Law*, para.2.1.

²⁸ *Loghdey v City of Cape Town* (Case 100/09) January 20, 2010 at [33].

²⁹ PAJA s.1(i). Also see *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) at [11] where the Supreme Court of Appeal held that an unsuccessful tenderer could rely on s.33 of the Constitution (in its interim reading) entitling such tenderers to “be furnished with reasons in writing for administrative action which affects any of their rights” on the basis “that the tenderer has the rights to lawful and procedurally fair administrative action” that are affected by the rejection of its tender. On this approach an unsuccessful tenderer must also have access to an appeal in terms of s.62 of the Systems Act.

³⁰ *CC Groenewald v M5 Developments* [2010] ZASCA 47 (March 31, 2010) at [21].

approach of the higher court in this case seems to confirm the position that unsuccessful tenderers do generally have access to appeals under s.62, as the law was previously understood contrary to the view adopted in *Loghdey*. However, in *CC Groenewald* it was expressly stated in the notification of the award that it was subject to the 21-day appeal period under s.62 of the Systems Act and that a contract would be concluded after that period had lapsed. In this respect the *CC Groenewald* case differed materially from that in *Loghdey* where the award notification did not contain such condition so that the two judgments can be distinguished. It is accordingly at present not clear whether a contracting authority can avoid appeals under s.62 by simply omitting any reference to it in the award notification. It is submitted that this should not be possible and that appeals by unsuccessful bidders should either be available under s.62 or not regardless of whether the award notification refers to such appeals. The better view is that s.62 appeals are generally available to disappointed tenderers where the award decision was taken under a delegated authority.

Regarding timeframes, it is noteworthy that while s.62 allows 21 days for notice of the appeal, reg.49 stipulates a period of 14 days for the complaint to be lodged. However, the High Court has interpreted the 14-day period as only a minimum period and held that a longer period provided for in a particular procurement policy will be effective and binding.³¹ The court did not, however, express a view as to the effect of the difference in time periods stipulated in the two enactments. As with the difference in the scope of the two remedies, a particular policy cannot deny a supplier the s.62 remedy, with the result that any maximum period for lodging complaints in a policy adopted in pursuance of reg.49 shorter than 21 days will largely be ineffective.

The final problem with the s.62 internal appeal remedy is to be found in subs.3, which states that the:

“appeal authority must consider the appeal and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision”.

The question that emerges from the application of this provision in the procurement context is whether rights accrue when a tender is awarded to a supplier (but before the contract is formally concluded) with the result that the s.62 remedy becomes largely ineffective in the hands of disappointed bidders. In a line of cases the courts have held that the answer depends on the formulation of the award decision. If the winning bidder is unconditionally informed that it has won the tender, rights will immediately vest in such supplier and s.62(3) will apply.³² This will certainly also be the case once a formal and unconditional contract had been concluded with the successful bidder.³³ However, if the award of the tender and/or the subsequent contract is made conditional upon an appeal period, rights will not vest before the expiry of the appeal period and s.62(3) will not apply.³⁴

While suppliers ostensibly enjoy extensive internal remedies in South African law, the usefulness in the procurement context of the most significant of these, the appeal remedy under s.62 of the Systems Act aimed at local government procurement, is currently in doubt. If the latest High Court interpretation of this provision stands, it will close down a major avenue of internal redress in public procurement and allow public authorities to simply circumvent internal appeals. Particularly noteworthy in this context is the courts’ strong reliance on the availability of judicial review as an alternative form of redress mitigating the adverse effects of a narrow interpretation of s.62 of the Systems Act.³⁵

³¹ *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T).

³² *Loghdey v City of Cape Town* (Case 100/09) January 20, 2010 and see *Loghdey v Advanced Parking Solutions* CC 2009 (5) SA 595 (C).

³³ *Loghdey v Advanced Parking Solutions* CC 2009 (5) SA 595 (C); *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (Case 508/2009 (O)) February 27, 2009.

³⁴ *Syntell (Pty) Ltd v The City of Cape Town* [2008] ZAWCHC 120 (March 13, 2008).

³⁵ See *Loghdey v City of Cape Town* (Case 100/09) January 20, 2010; *City of Cape Town v Reader* 2009 (1) SA 555 (SCA) at [35].

4. Judicial enforcement

Public procurement disputes in South Africa are dealt with in the ordinary courts, mostly in the High Court and on appeal to the Supreme Court of Appeal. Since public procurement regulation is based on s.217 of the Constitution, such disputes can also eventually end up in the Constitutional Court.³⁶ There is thus no separate or special court or tribunal tasked with the enforcement of public procurement rules. This has played an important role in the development of public procurement law in South Africa, since suppliers have relied on general remedies in contract and administrative law in procurement disputes and the ordinary courts have used general civil remedies to grant relief.³⁷ Litigation on public procurement disputes is fairly common in South Africa, as Nugent JA noted in *South African Post Office v De Lacy*³⁸: “Cases concerning tenders in the public sphere are coming before the courts with disturbing frequency.” Recourse to courts in public procurement disputes can be categorised into three main areas, viz interim relief, judicial review and damages claims.

4.1 Interim relief

It is now fairly common for disgruntled bidders to seek (mostly urgent) interim relief as soon as the award decision has been communicated pending further legal action.³⁹ Such relief typically takes the form of an order precluding the contracting authority and the successful bidder from concluding the tender contract and/or proceeding with execution under the contract until an application for review is heard. As will become evident below in the discussion on judicial review, such interim relief is, however, not necessarily crucial to the success of challenging procurement decisions since review courts are able to set aside a tender contract after conclusion and even after substantial execution of the contract. Against this background interim relief thus serves a more particular purpose in the public procurement remedies regime in avoiding loss that cannot be adequately redressed in later proceedings, which will mostly only be the case if the review is heard only after full or near-full performance under the contract.

The general requirements for interim relief⁴⁰ also apply in public procurement cases. The applicant must show a clear right, which, “though prima facie established, is open to some doubt”, the apprehension of irreparable harm if the relief is not granted and the absence of an alternative remedy.⁴¹ It is a discretionary remedy and the court weighs the interests of the respective parties in granting or withholding the relief, referred to as the balance of convenience.⁴² These requirements are not viewed in isolation or mechanically assessed, but “are interrelated and interact with each other”⁴³ so that the “court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities”⁴⁴

³⁶ This is South Africa’s highest court, but with jurisdiction limited to constitutional matters.

³⁷ See Quinot, *State Commercial Activity* (Claremont: Juta Law, 2009), Ch.3.

³⁸ 2009 (5) SA 255 (SCA) at [1].

³⁹ PAJA s.8(1)(e) expressly provides for such relief pending judicial review applications. For recent examples see *Cash Paymaster Services (Pty) Ltd v The Chief Executive Officer of the South African Social Security Agency NO* (Case 53753/09) December 10, 2009 (North Gauteng High Court); *Itumele Bus Lines (Pty) Ltd v LUR Department van Polisie, Paaie en Vervoer van die Vrystaat Provinsie* (4718/09) [2009] ZAFSHC 123 (December 3, 2009); *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2009 (3) SA 187 (W); *TBP Building & Civils v the East London Industrial Development Zone (Pty) Ltd* [2009] JDR 0203 (ECG); *Indo Contractors CC v TFCM (Pty) Ltd* [2009] JOL 23768 (KZD); *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (508/2009) [2009] ZAFSHC 21 (February 27, 2009); *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (2008/19224) [2008] ZAGPHC 272 (September 8, 2008); *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] 4 All SA 168 (NC); *Matlafalang Training CC v MEC: Free State, Department of Public Works* (5412/2008) [2008] ZAFSHC 136 (December 11, 2008).

⁴⁰ See *Eriksen Motors (Welkom) Ltd v Protea Motors* 1973 (3) SA 685 (A); *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A).

⁴¹ *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (2008/19224) [2008] ZAGPHC 272 (September 8, 2008) at [7]; also see *TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd* [2009] JDR 0203 (ECG) at [30]; *Matlafalang Training CC v MEC: Free State, Department of Public Works* (5412/2008) [2008] ZAFSHC 136 (December 11, 2008) at [7].

⁴² *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (2008/19224) [2008] ZAGPHC 272 (September 8, 2008) at [7], [24]–[28]; *TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd* [2009] JDR 0203 (ECG) at [34].

⁴³ *TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd* [2009] JDR 0203 (ECG) at [30].

⁴⁴ *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (2008/19224) [2008] ZAGPHC 272 (September 8, 2008) at [7].

in exercising its discretion. In this type of case the first requirement, that of a prima facie right, is established by indicating that the procurement decision stands to be reviewed under s.33 of the Constitution and PAJA or directly under s.217 of the Constitution, i.e. that the applicant can make out a prima facie case for the review of the decision.⁴⁵ This leg of the inquiry does not present particular problems. It is rather the second and third requirements, which also inform the balance of convenience analysis, that tend to be problematic in procurement cases.⁴⁶ It may be quite difficult for an applicant to prove the harm that he attempts to avoid in applying for interim relief in such a case. The same considerations will also make it difficult to show the absence of an alternative remedy, particularly in the contemplated review application.⁴⁷ While the motivation behind these cases is obviously to get the contract,⁴⁸ the unsuccessful bidder will mostly not be able to show that such a result will follow even pursuant to a successful review application, i.e. if the prima facie right is vindicated. First, the outcome of the review will mostly only be the setting aside of the tender decision and only in the most exceptional cases will the review court actually order the tender to be awarded to the applicant. The applicant's legal entitlements under the review are thus extremely limited. His entitlement to the contract is highly speculative and will mostly not swing the balance of convenience in his favour. Secondly, the applicant will find it difficult to prove that the contract will be awarded to it following the set aside upon review. Thus, as both a matter of law and fact, the harm that the applicant for interim relief seeks to avoid mostly cannot be the failure to secure the contract.⁴⁹ The harm is located in a more generalised interest in administrative justice and fair public contracting and at best for the applicant, the opportunity to participate in such a fair tender process. It seems that this interest, despite its constitutional pedigree, quite easily bends the knee to the more immediate and concrete competing commercial interests of the contracting authority and often the public that is served by the procurement in the background at the interim relief stage.⁵⁰

The analysis above is bolstered by the reality that it is only the interests served by the set aside remedy under judicial review that can be protected through interim relief in these instances. In other words, it is the viability of the set aside remedy under the envisaged review proceedings that determines whether interim relief is justifiable.⁵¹ If the interests can also adequately be protected by monetary compensation, interim relief will not be justifiable, since compensation is always available in review proceedings as I will indicate below,⁵² i.e. there will always be an alternative remedy available.⁵³ It follows that interim relief will be restricted in this context to those cases where the option of set aside under judicial review is critical to the protection of the rights at stake. It is submitted that this should only be the case where the

⁴⁵ See *TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd* [2009] JDR 0203 (ECG) at [14]; *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] 4 All SA 168 (NC) at [17] and [26]; *Indo Contractors CC v TFMC (Pty) Ltd* [2009] JOL 23768 (KZD) at [5]; *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (Case 508/2009 (O)) February 27, 2009 at [37]–[39]; *Matlafalang Training CC v MEC: Free State, Department of Public Works* (5412/2008) [2008] ZAFSHC 136 (December 11, 2008) at [8], [11]–[13].

⁴⁶ See e.g. *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] 4 All SA 168 (NC) at [27] and *Eskom Holdings Ltd v The New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) at [11].

⁴⁷ See *Matlafalang Training CC v MEC: Free State, Department of Public Works* (5412/2008) [2008] ZAFSHC 136 (December 11, 2008) at [21].

⁴⁸ See G. Quinot, "Towards Effective Judicial Review of State Commercial Activity" [2009] *Journal for South African Law* 436, 442–443.

⁴⁹ See *Matlafalang Training CC v MEC: Free State, Department of Public Works* (5412/2008) [2008] ZAFSHC 136 (December 11, 2008) at [21].

⁵⁰ See *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (2008/19224) [2008] ZAGPHC 272 (September 8, 2008) at [24]–[28] and *Indo Contractors CC v TFMC (Pty) Ltd* [2009] JOL 23768 (KZD) at [11]–[13].

⁵¹ See *Matlafalang Training CC v MEC: Free State, Department of Public Works* (5412/2008) [2008] ZAFSHC 136 (December 11, 2008) at [21].

⁵² However, for a contrary view see *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike* (Case 508/2009 (O)) February 27, 2009 at [80]–[84].

⁵³ This position is not beyond doubt. There is an uncomfortable interaction between the requirements for interim relief and especially principles of mitigation of loss in damages or compensation claims. While interim relief may be refused if an alternative remedy such as a damages claim exists, claimants in damages actions in this context have also been criticised for not mitigating their losses by applying for interim relief. See *Olitzki Property F Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) at [37]–[38] and *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) 506. In this context it seems that both remedies may fail on the basis of the potential availability of the other: the interim relief because of the possibility of a later damages claim and the damages claim because of the possibility of earlier interim relief. It should also be stressed at this stage that it is the mere availability of the alternative remedy that impacts on interim relief, rather than the eventual likelihood of such alternative being granted. As I will indicate below, it seems that although compensation is in principle available in a review application, the likelihood of such relief being granted in tender cases seems slim.

grounds of review support set aside as a “just and equitable”⁵⁴ remedy⁵⁵ and where the applicant can show a reasonable likelihood that it may win the contract if the award is reconsidered by the contracting authority (or in exceptional cases the court).

The courts have, however, also awarded interim relief to signal their disapproval with contracting authorities that conclude and implement public contracts in a rush and under a protracted veil of secrecy, with the intention of reaching a critical stage of advanced performance beyond which judicial review will no longer be feasible.⁵⁶ In one such instance the court awarded interim relief, suspending the implementation of the tender contract at issue approximately eight months after the award of the tender and after work apparently worth R82 million (of the total R94 million contract price) had already been done.⁵⁷ The court rejected the contracting authority’s argument that the interim relief would cause significant harm to it and the public given the advanced stage of performance under the contract and found that the authority was aware of the applicant’s reservations regarding the tender process and intention to challenge it immediately following the award decision.⁵⁸ The court furthermore pointed to the contracting authority’s tardiness in assisting the aggrieved bidder to adequately assess its legal position, causing the delay and held that where an organ of state fails to assist unsuccessful bidders and rushes into concluding and implementing a public contract, knowing of an unsuccessful tenderer’s reservations about the tender process, it could not rely on partial performance to resist the interim relief and eventually judicial review.⁵⁹

While it thus seems that interim relief is not easily obtained in public procurement cases given the wide range of remedies available under judicial review, the courts have also not hesitated to award such relief, primarily to protect the viability of later review remedies, where it seemed that the contracting authority did not properly engage with aggrieved bidders after the award decision was taken.

4.2 Judicial review

As noted above, it is now generally accepted in South Africa that at least the decision to award a public tender and consequently the preceding procurement process amount to administrative action.⁶⁰ Consequently, the Supreme Court of Appeal confirmed recently that:

“[o]rdinarily, where there has been a reviewable irregularity in the award of the tender, an unsuccessful tenderer would be entitled to call for the award to be set aside”.⁶¹

Judicial review is thus entrenched as a mechanism to enforce public procurement laws governing this part of the procurement process. While the focus of this contribution is really on the orders granted by courts in such proceedings, an assessment of the remedies awarded by courts in judicial review applications cannot be properly understood without an appreciation of the applicability of administrative law rules through judicial review proceedings to public procurement decisions. As I have argued elsewhere⁶² the substance of a review application, i.e. the ground(s) of review, should play an integral part in the formulation of appropriate remedies in public procurement cases. The discussion of judicial review remedies below thus starts with an analysis of the application of administrative law rules through judicial review to procurement decisions.

⁵⁴ Both the Constitution s.172(1)(b) and PAJA s.8(1) provide that a review court may grant any order that is “just and equitable”.

⁵⁵ See Quinot, “Towards Effective Judicial Review of State Commercial Activity” [2009] *Journal for South African Law* 436, 443–445.

⁵⁶ See G. Quinot, “Public Procurement” [2008] 1 *Juta’s Quarterly Review of South African Law*, para.2.1 (available at http://sun025.sun.ac.za/portal/page/portal/law/index.english/public_proc/resources [Accessed September 16, 2011]).

⁵⁷ *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] 4 All SA 168 (NC).

⁵⁸ *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] 4 All SA 168 (NC) at [27]–[28].

⁵⁹ *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] 4 All SA 168 (NC). Also see *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA).

⁶⁰ Quinot, *State Commercial Activity: A Legal Framework* (Claremont: Juta Law, 2009), pp.162–163.

⁶¹ *Eskom Holdings v The New Reclamation Group* 2009 (4) SA 628 (SCA) at [11].

⁶² Quinot, “Towards Effective Judicial Review of State Commercial Activity” [2009] *Journal for South African Law* 436.

In terms of s.33 of the Constitution and PAJA, which codifies the administrative law grounds of review,⁶³ public procurement award decisions may be reviewed for lawfulness, reasonableness and procedural fairness. The standard of reasonableness adds considerable potency to this enforcement mechanism. This flexible standard of review may range from threshold rationality review to proportionality or a standard quite close to it.⁶⁴ Under this standard it is accepted that judicial review will “involve the consideration of the ‘merits’ of the matter in some way or another”⁶⁵ and that “the review functions of the Court now have a substantive as well as a procedural ingredient”.⁶⁶ In addition, the requirements in s.217 of the Constitution are also directly justiciable, and courts can thus review procurement decisions for being “fair, equitable, transparent, competitive and cost-effective”.⁶⁷ Again, these requirements mandate scrutiny upon review beyond the mere procedural dimensions of procurement decisions.

While the review of decisions in the award stage of public procurement is commonplace in South Africa, the judicial scrutiny of other stages in the process, in particular the preceding planning stage and the post-award contract administration stage,⁶⁸ is less clear. In the post-award stage South African courts have been oscillating between applying general rules of contract law and administrative law to state action.⁶⁹ Judicial review has thus not consistently functioned as an enforcement mechanism in this stage of the procurement process. Decisions such as termination of the contract, refusals to renew and exclusions from future government contracts based on improper conduct under an existing contract have been inconsistently subjected to judicial scrutiny.⁷⁰ It is even less clear whether decisions taken in the planning stage are subject to judicial review. Decisions taken in this first stage may of course eventually be challenged when the award decision is challenged, e.g. if the award criteria applied in a particular case did not comply with the statutory rules governing the formulation of such criteria, the award itself may be reviewable.⁷¹ However, free-standing challenges to decisions in the planning stage have been rare, but not unheard of. In a recent judgment, the Supreme Court of Appeal reviewed and set aside a decision by a contracting authority to change its procurement approach from a decentralised to a centralised one in the absence of a challenge to a particular award decision.⁷² This case was exceptional though, since the supplier-applicants could show that they had a legitimate expectation that the existing approach would continue, which triggered rules of procedural fairness in relation to the planning decision to depart from the established approach. The limits of free-standing challenges to planning decisions are thus not clear. Locus standi will certainly be a significant hurdle to such applications, since it will be difficult for applicants to show what their interests are in the absence of an actual call for tenders and award decision. However, one can imagine such challenges being entertained, especially on reasonableness grounds, regarding the role of

⁶³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at [25].

⁶⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at [45]; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at [108].

⁶⁵ *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) at [36].

⁶⁶ *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at [45].

⁶⁷ *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) at [17]–[18]; *Chairperson, Standing Tender Committee v JFE Sapela Electronics* 2008 (2) SA 638 (SCA) at [14]; *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) at [9].

⁶⁸ See S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement* (London: Kluwer Law International, 2000), pp.1–2.

⁶⁹ Quinot, *State Commercial Activity: A Legal Framework* (Claremont: Juta Law, 2009), Ch.3.

⁷⁰ Cf. *Equity Aviation Services (Pty) Ltd v South African Post Office Ltd* [2008] JOL 21404 (T); *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at [21]; *Zimport Water Service CC v Minister of Public Works, Director-General Department of Public Works v Chairperson Bid Adjudication Committee* (37169/06 & 41073/06) [2008] ZAGPHC 82 (February 21, 2008); *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA); *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA); *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA); *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* 2008 (6) SA 220 (SCA); Quinot, “Public Procurement” [2008] 1 *Juta’s Quarterly Review of South African Law*, para.2.3; Quinot, “Public Procurement” [2008] 3 *Juta’s Quarterly Review of South African Law*, para.2.1 (available at http://sun025.sun.ac.za/portal/page/portal/law/index.english/public_proc/resources [Accessed September 16, 2011]).

⁷¹ See e.g. *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape (No 2)* 2009 (6) SA 589 (SCA) where tender conditions relating to past experience were challenged as part of a challenge to the award of the tender and *TBP Building & Civils v the East London Industrial Development Zone* [2009] JDR 0203 (ECG) where the award criteria relating to “quality or functional assessments” were challenged.

⁷² *MEC for Education, Northern Cape Province v Bateleur Books (Pty) Ltd* 2009 (4) SA 639 (SCA).

horizontal policies⁷³ in procurement decisions at the planning stage. For example, environmental groups may be able to challenge a decision by a contracting authority in formulating specifications of goods required as unreasonable in the light of the environmental rights guaranteed in s.24 of the Constitution.⁷⁴

In a line of recent cases it has been confirmed that contracting authorities also have standing to apply for the review and setting aside of their own award decisions.⁷⁵ In fact, it has been held that “a public body may not only be entitled but also duty bound to approach a court to set aside its own irregular” decisions⁷⁶ and that a contracting authority “was under a duty not to submit itself to an unlawful contract and [was] entitled, indeed obliged, to ignore the ... contract and to resist attempts at enforcement”.⁷⁷ This includes applications for review based on the authority’s own internal failures.⁷⁸ The position must be understood against the general administrative law rule that “even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside”.⁷⁹ This general rule implies that until the award decision is set aside by a court, a valid contract will come into existence between the contracting authority and the winning bidder on the basis of the award decision.⁸⁰ It may also imply that even where an award decision is reviewed and set aside, a valid and enforceable contract may still exist, although this position has not been clearly decided in South Africa.⁸¹ The only way for any party, including the contracting authority, to attain certainty regarding the validity of a public contract in the light of ostensible failures in the procurement process is to approach a court for an order on review.

Applications for judicial review under PAJA must be instituted within 180 days after the person affected became aware of the decision or “might reasonably have been expected to have become aware” of the decision and reasons for it or within 180 days after any internal remedies have been exhausted.⁸² This time limit may, however, be extended by agreement between the parties or by the court upon application.⁸³ If one keeps in mind the time frame for the request and provision of reasons under PAJA,⁸⁴ the time limit for launching review applications becomes quite an extended one. At the maximum it may be possible to bring a review application within time at almost a full year after the relevant decision.⁸⁵ This extended period can significantly undermine efficient procurement, especially given the potentially “freezing” effect of interim relief, the courts’ power to set aside concluded contracts even after significant performance under those contracts and the recent remarks by the Constitutional Court that a winning tenderer should

⁷³ Sometimes also referred to as secondary or collateral policies. The label “horizontal policies” was adopted by S. Arrowsmith and P. Kunzlik in preference to these other terms, in part because the label “horizontal policies” does not imply that these policies are in any way of lesser importance than other objectives of procurement, see S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009), Ch.1.

⁷⁴ See P. Bolton, “Incorporating Environmental Considerations into Government Procurement in South Africa” [2008] *Journal for South African Law* 31, 31–39 who argues that “[s]ection 24 [of the Constitution] requires that organs of state must use their procurement powers to protect the environment” and 41–44 where she indicates how environmental concerns can inform decisions in the planning stages of procurement in South Africa.

⁷⁵ *Municipal Manager: Qaukeni Local Municipality v FV General Trading* [2009] 4 All SA 231 (SCA) at [23]; *TBP Building & Civils v the East London Industrial Development Zone* [2009] JDR 0203 (ECG); *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality* [2009] JDR 0299 (EL); *Zimport Water Service CC v Minister of Public Works* (37169/06 & 41073/06) [2008] ZAGPHC 82 (February 21, 2008) at [60]–[61]; also see *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at [36].

⁷⁶ *Municipal Manager: Qaukeni Local Municipality v FV General Trading* [2009] 4 All SA 231 (SCA) at [23].

⁷⁷ *Premier, Free State v Firechem Free State* 2000 (4) SA 413 (SCA) at [36].

⁷⁸ *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality* [2009] JDR 0299 (EL).

⁷⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at [26]; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at [24]; *Zimport Water Service CC v Minister of Public Works* (37169/06 & 41073/06) [2008] ZAGPHC 82 (February 21, 2008) at [39].

⁸⁰ See *Zimport Water Service CC v Minister of Public Works* (37169/06 & 41073/06) [2008] ZAGPHC 82 (February 21, 2008) at [39].

⁸¹ See G. Quinot, “Towards Effective Judicial Review of State Commercial Activity” [2009] *Journal for South African Law* 436, 444–446. cf. *Zimport Water Service CC v Minister of Public Works* (37169/06 & 41073/06) [2008] ZAGPHC 82 (February 21, 2008) at [98] et seq.

⁸² PAJA s.7(1).

⁸³ PAJA s.9(1).

⁸⁴ An affected person has 90 days following the decision to request reasons and the administrator has 90 days following the request to provide reasons, both of which may also be extended by agreement or a court. PAJA ss.(1), (2), 9(1).

⁸⁵ G. Quinot, “Worse Than Losing a Government Tender: Winning It!” (2008) 19 *Stellenbosch Law Review* 101, 113–114.

“curb its commercial enthusiasm”⁸⁶ and “may not leap without looking”,⁸⁷ but must wait for the legal position to settle before performing under a contract, thereby judicially introducing a “standstill period” following award of public tenders.⁸⁸

Courts are also barred from entertaining reviews if any internal remedies have not been exhausted.⁸⁹ Only under exceptional circumstances may a court hear an application for review if any such internal remedies are still available.⁹⁰ It is thus critical to know whether any internal administrative remedies are available in order to access judicial enforcement mechanisms. This highlights the need for clarity on the position regarding internal supplier remedies in the procurement regime, which as indicated above is all but clear.⁹¹

On application for judicial review a court is empowered to “grant any order that is just and equitable”.⁹² In the procurement context this includes orders setting award decisions aside and declaring concluded contracts void. Review courts have even been prepared to grant such orders after advanced performance under the contract.⁹³ The most recent authoritative judicial pronouncements on this issue suggest that setting aside is indeed the default remedy and that a court will only under exceptional circumstances refuse such relief once it has found the relevant decision to be reviewable.⁹⁴ However, the remedy is also discretionary and the courts have held that all interests need to be considered before granting such an order. In a key passage the Supreme Court of Appeal recently declared:

“The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates [(Pty) Ltd v City of Cape Town]* 2004 (6) SA 222 (SCA), is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.”⁹⁵

While setting aside thus seems to be the default remedy, it should by no means be the automatic outcome of a review application. Every instance calls for a careful weighing up of the competing interests at stake with due recognition of interests that may be affected beyond those of the immediate parties to the application. As I have argued elsewhere,⁹⁶ this opens the door to meaningful refinement of the remedies regime in procurement cases that is suitable to local circumstances.

⁸⁶ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at [52], but see the criticism of this approach in the minority judgment of Langa C.J. and O'Regan J. at [83].

⁸⁷ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at [51].

⁸⁸ See Quinot, “Worse Than Losing a Government Tender: Winning It” (2008) 19 *Stellenbosch Law Review* 101, 113–114; M. Du Plessis and G. Penfold, “Bill of Rights Jurisprudence” (2007) *Annual Survey of South African Law* 67, 93.

⁸⁹ PAJA s.7(2)(a) & (b).

⁹⁰ PAJA s.7(2)(c).

⁹¹ See section 3.

⁹² Constitution s.172(1)(b); PAJA s.8(1).

⁹³ See *Eskom Holdings v The New Reclamation Group* (4) SA 628 (SCA).

⁹⁴ *Eskom Holdings v The New Reclamation Group* (4) SA 628 (SCA) at [16] where the court labelled the judgment in *Chairperson, Standing Tender Committee v JFE Sapela Electronics* 2008 (2) SA 638 (SCA) as “an exceptional case” where set aside was refused despite the existence of reviewable irregularities in the award decision.

⁹⁵ *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) at [23].

⁹⁶ Quinot, “Towards Effective Judicial Review of State Commercial Activity” [2009] *Journal for South African Law* 436.

5. Damages and compensation claims

The possibility of claiming delictual damages (i.e. damages in tort) following irregularities in a public tender process has virtually been quashed in South African law following a number of recent judgments.⁹⁷ The one exception remains instances of fraud in the tender process, as authoritatively held in *Minister of Finance v Gore NO*.⁹⁸ In the absence of fraud, dishonesty, or corruption neither an unsuccessful nor initially successful tenderer will be able to claim delictual damages in any form.⁹⁹ This is because, as the Constitutional Court held in *Steenkamp*,¹⁰⁰ a contracting authority's negligent but bona fide conduct in the public tender process would not be wrongful in a delictual sense since it owes no legal duty to tenderers to avoid such losses. The court extended this reasoning to both initially successful and unsuccessful tenderers and in relation to loss of profits, out-of-pocket expenses in preparing the tender and "financial loss on the strength of the award which is subsequently upset on review by a court order".¹⁰¹ It is clear that the South African reality of limited public resources plays an important role as a policy factor against the recognition of delictual claims in these instances.¹⁰²

The position is different when the award decision is made "in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision".¹⁰³ Particularly in cases involving fraud the courts have been prepared to award delictual damages for loss of profits in quite significant amounts.¹⁰⁴ However, following the *Steenkamp* matter¹⁰⁵ it seems that out-of-pocket expenses in preparing the bid will never be recoverable. In that case the court stated with reference to such losses: "In any event the latter class of expenses is always irrecoverable whatever the fate of the tender is. On any outcome, expenses for preparing a tender have to be incurred."¹⁰⁶

Public law causes of action may provide an alternative basis for damages, or more accurately, compensation claims. PAJA provides for compensation orders under exceptional circumstances in review applications.¹⁰⁷ It may thus be possible for an unsuccessful tenderer to obtain compensation when challenging a tender award upon review. Against the backdrop of the Constitutional Court's rejection of the delictual damages claim in *Steenkamp*,¹⁰⁸ it is, however, doubtful whether a claim for compensation under PAJA will easily succeed in tender review cases. The broad policy considerations that the court put forward in denying the claim in that case will also in all likelihood thwart a compensation claim under PAJA, especially given the statutory qualification of such orders as exceptional.¹⁰⁹ A compensation claim under PAJA would

⁹⁷ See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA); and also Malan J.'s remarks in *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (2008/19224) [2008] ZAGPHC 272 (September 8, 2008); Quinot, "Worse Than Losing a Government Tender: Winning It" (2008) 19 *Stellenbosch Law Review* 101.

⁹⁸ 2007 (1) SA 111 (SCA); also see *Transnet Limited v Sechaba Photoscan (Pty) Limited* 2005 (1) SA 299 (SCA); *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) at [2]–[5], [14] and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at [55(a)].

⁹⁹ Du Plessis and Penfold, "Bill of Rights Jurisprudence" (2007) *Annual Survey of South African Law* 67, 93–94.

¹⁰⁰ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at [54], [56].

¹⁰¹ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).

¹⁰² See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at [55(c)] and the statements by the minority at [81]:

"[W]e are of the view that an unsuccessful tenderer who may have a tender award set aside and then re-tender should not in addition be afforded an entitlement to claim loss of profits in respect of the original tender I where the claim is based on negligence. Whatever the situation may be in societies wealthier than ours, to afford an unsuccessful tenderer such a claim in our society would unduly burden the public purse that is already beset with more legitimate claims than it can possibly meet."

¹⁰³ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at [55(a)].

¹⁰⁴ *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA); *Gore v Minister of Finance* [2008] JDR 1352 (T); *Transnet Limited v Sechaba Photoscan (Pty) Limited* 2005 (1) SA 299 (SCA).

¹⁰⁵ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).

¹⁰⁶ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at [53]; Du Plessis and Penfold, "Bill of Rights Jurisprudence" (2007) *Annual Survey of South African Law* 67, 93. Also see the remarks by the Supreme Court of Appeal in this matter, *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at [35].

¹⁰⁷ PAJA s.8(1)(c)(ii)(bb).

¹⁰⁸ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).

¹⁰⁹ Cf. *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (Case 508/2009 (O)) February 27, 2009 at [81].

be subject to the same policy concerns such as the availability of alternative remedies in the form of contractual protection or proceeding with caution; the impact on the public purse and the functioning of tender boards.¹¹⁰ This much was recognised by the High Court in *Darson Construction*¹¹¹ when it declared:

“Mindful of the fact that the award of constitutional damages is not to be confused with delictual liability, I am nevertheless of the view that the practical considerations behind the policy which has led courts to decline to recognise the delictual claims of unsuccessful tenderers (and successful tenderers who are subsequently ousted) for loss of profits carry considerable weight when deciding, on the facts of this case, whether an award of applicant’s loss of profit is ‘just and equitable’ and an appropriate remedy.”

While it seems fair to argue that a claimant for compensation under PAJA should not be saddled with a burden of proof equivalent to that in a delictual damages claim,¹¹² such a claimant at a minimum faces the uphill battle of showing that compensation will be “just and equitable” under the circumstances, that the case is exceptional and that compensation will serve “to pre-empt or correct or reverse an improper administrative function” and that it will inter alia “advance efficient and effective public administration”.¹¹³ The first two requirements will make a claim for out of pocket expenses in submitting a bid very difficult, given the courts’ ostensible view that such expenses must always be incurred.¹¹⁴ The final set of requirements, going to the purpose of the remedy, will also inhibit compensation orders generally given the courts’ sensitivity to the impact of orders on limited public resources.

It seems that despite the various avenues available to suppliers to claim damages or compensation in procurement disputes, such orders are not favourably viewed in South African law as appropriate mechanisms to enforce public procurement regulation.

6. Conclusion

Public procurement law in South Africa is enforced by a highly fragmented remedies regime where weaknesses in one set of remedies quite often undermine the effectiveness of another set of remedies. The remedies are often at odds with each other and the interaction between the various individual remedies has unfortunate consequences that undermine the effectiveness of the entire remedies regime. This lack of coherence in enforcement breeds uncertainty that is particularly detrimental to both public procurement as a critical governmental function, including the public functions reliant on such procurement, and the principled development of the law towards its transformative role envisaged in the Constitution and in particular s.217.

As the discussion indicated, at least concerning supplier remedies, procurement rules are largely enforced via ordinary, general remedies. These are not always well suited to the particular procurement context and there is accordingly a need to develop the general remedies towards a procurement-specific regime. There are some promising indications that such development may be under way, albeit in a very limited and tentative sense. In a case such as *Logbro Properties*,¹¹⁵ the court seemed appropriately sensitive towards the indiscriminate application of judicial review standards to the commercial context of public contracting. The court held that while “[p]rinciples of administrative justice continued to govern” the commercial relationship, the “conditions for which the ... [contracting authority] stipulated in putting out

¹¹⁰ See Quinot, “Worse Than Losing a Government Tender: Winning It” (2008) 19 *Stellenbosch Law Review* 101, 115.

¹¹¹ *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) at 509.

¹¹² See Bolton, *The Law of Government Procurement in South Africa* (Durban: Lexis Nexis Butterworths, 2007), pp.332–333; Du Plessis and Penfold, “Bill of Rights Jurisprudence” (2007) *Annual Survey of South African Law* 67, 93.

¹¹³ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at [29].

¹¹⁴ See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at [53].

¹¹⁵ *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA).

the tender ... might bear on the exact ambit of the ever-flexible [public law] duty to act fairly”.¹¹⁶ In another recent judgment, *Millennium Waste Management*,¹¹⁷ the court showed a keen awareness of the multiple and particular interests at stake in procurement disputes. As a result the court fashioned an innovative remedy in the form of a conditional set-aside order, which facilitated appropriate external (judicial) control over the procurement process, but left the substantive commercial decisions in the hands of the contracting authority and without interruption of service delivery reliant on the particular procurement.¹¹⁸ A third example is the judgment in *Tetra Mobile Radio*¹¹⁹ which used the fairness requirement in s.217 of the Constitution to formulate a duty of disclosure of all tender documents to aggrieved bidders in order to facilitate challenges to the award. This judgment is particularly interesting for the court’s approach to confidentiality in the documents. It ordered that the information identified as confidential by the contracting authority had to be provided only to the aggrieved bidder’s legal representatives and on the basis that the latter were not allowed to disclose such information to third parties, including the aggrieved bidder, with the exception of legal counsel and expert witnesses and then only for the purpose of the legal challenge.

While these recent judgments indicate a greater willingness to mould remedies to suit the particular needs of the public procurement context, there are also examples of judgments refusing to follow suit and that seemingly insist on following either a generalised remedial approach or refusing to grant a remedy at all in response to particular public procurement concerns. Examples include the *Steenkamp* matter¹²⁰ where the courts refused to allow a delictual claim for the loss of the initially successful tenderer incurred on the strength of an award that was later set aside upon review, without acknowledging the lack of any alternative remedy. Another example is the obiter remark in *Thabiso Chemicals*¹²¹ that:

“the principles of administrative law have [no] role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law.”¹²²

But even more troubling than these individual judgments that do not appear to support a move towards a procurement-specific remedies regime, is the seeming trend in favour of strong judicial involvement in the public procurement enforcement regime. This trend is evident in the recent exclusion of tender disputes from the general internal administrative remedy at local government level, viz the internal appeal mechanism in s.62 of the Systems Act; the continued enthusiasm with which tender awards are simply set aside as the default response to reviewable irregularities in the award process; the uncritical voiding of tender contracts, even after partial performance, as an automatic result of the review; and the grant of interim relief pending review on the strength of a *prima facie* review case, regardless of the particular ground of review at stake. In my view this bias in favour of strong judicial enforcement must be reassessed in the development of a more appropriate public procurement remedies regime in South Africa.

The purpose of a new remedies regime must be to give effect to the overarching guiding constitutional principles found primarily in s.217, but also in other sections such as ss.33 and 195. The challenge is to develop remedies that are consciously focused on the realisation of these principles. In this endeavour the particular South African context must be a core consideration. For public procurement that context implies a large-scale policy function in redressing the inequalities caused by colonisation and apartheid and the economic realities of South Africa, with its tremendous socio-economic needs and severely limited resources. Within this reality, courts are certainly not the best institutions to act as primary enforcement

¹¹⁶ *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) at [7]–[8].

¹¹⁷ *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA).

¹¹⁸ See Quinot, “Towards Effective Judicial Review of State Commercial Activity” [2009] *Journal for South African Law* 436, 445.

¹¹⁹ *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA).

¹²⁰ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA).

¹²¹ *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) at [18].

¹²² See Quinot, “Public Procurement” (2008) 1 *Juta’s Quarterly Review of South African Law*, para.2.1.

agents. The relative inaccessibility of High Courts, which fulfil this function; long delays in the adjudication of cases; multiple appeal and/or review opportunities; high (litigation) costs, both to the individual applicants and the public purse; generous review grounds and rules of locus standi; lack of technical expertise on the part of ordinary judges hearing such matters; and the animosity bred by constant judicial interference in administration and resultant service delivery delays are all familiar concerns with a model of primary judicial enforcement. Such an enforcement model does not seem able to deliver a public procurement system “which is fair, equitable, transparent, competitive and cost-effective” nor does it itself display these qualities.

The eventual question is thus how to proceed in developing a new public procurement remedies regime for South Africa. In answering this question comparative insights will be important, but must also be treated with caution. The particular South African context implies that approaches emanating from the developed, Western world cannot be adopted wholesale. I believe that engagement with regulators from systems with mature public procurement regimes can be of tremendous benefit, but it is probably more local engagement, in our region and our continent, that will prove to be the most useful and this is an endeavour that has barely started.